IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 160 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PARBHUBHAI K PATEL & 4 - Appellant(s)
Versus
DAHYABHAI KARSHANBHAI PATEL & 2 - Defendant(s)

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Appearance :
MR RN SHAH for Appellant(s) : 1 - 5.
MR BP DALAL for Defendant(s) : 1 - 3.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 13/03/2007

ORAL JUDGMENT

1. Heard Mr.R.N.Shah, learned counsel for the appellants and Mr.B.P. Dalal, learned counsel for the respondents.

2. The present suit was filed in the year 1982 by heirs, successors and legal representatives of one Dahyabhai Chhitabhai against Parbhubhai Karshanbhai Patel, Diwaliben widow of Karshanbhai Patel, Sukhiben daughter of Karshanbhai Patel, Jasuben Maganbhai and Parvatiben Thakorlal (last two being granddaughters of Karshanbhai) for declaration of title and possession of land of Survey No.419 admeasuring 6 Acres and 1 Guntha of village Vesma, Taluka Navsari, District Bulsar. For proper understanding of the matter, it would be necessary to understand the pedigree.

3. One Chhitabhai had two sons namely Dahyabhai (the elder one) and Karshanbhai (the younger son). The defendants are from the branch of Karshanbhai, while the plaintiffs are from the branch of Dahyabhai. It is the case of the plaintiffs that they had purchased the property after paying consideration and as the defendants were in possession and were asserting their hostile title in the revenue proceedings, they were required to file the suit. It was submitted that they have purchased the property, the title be declared in their favour and the decree for possession be granted. The defendants appeared before the court and submitted that Dahyabhai son of

Chhitabhai migrated to Africa somewhere in the year 1933 and thereafter settled in United Kingdom. However, after paying some money, he had purchased the land in dispute. It is also the case of the defendants that Khandubhai son of Dahyabhai, in fact, was son of Karshanbhai, but went in adoption to Dahyabhai. It is also the case of the defendants that the transaction was benami, while in fact, the money was paid by the said Karshanbhai and he remained in possession of the property since after its purchase. In the alternative, it is submitted that the property was purchased by Dahyabhai and it was given to Karshanbhai for his maintenance. It is also asserted that somewhere in the year 1970, the name of Karshanbhai came to be recorded in the revenue records as occupant of the property and after death of Dahyabhai, the name of Karshanbhai continued on the record. It is also submitted that after death of Dahyabhai somewhere in the year 1973, nobody ever asserted their title and the defendants enjoyed exclusive possession of the property. It was further submitted that the said Karshanbhai died somewhere in the year 1979 and after his death, when the defendants wanted their name to be mutated in the records, the dispute arose and thereafter,

the plaintiffs who are residing in United Kingdom, suddenly filed the suit.

4. The learned trial court, after recording evidence and hearing the parties, held that the plaintiffs were successful in proving their title and further held that the defendants could not prove either derivative title in their favour or acquisition of rights by adverse possession. As the findings were confirmed by the appellate court, the defendants are before this Court.

5. The appeal has been admitted for hearing the parties on the following substantial questions of law:-

(i) In the facts and circumstances of the case, it should have been held that the deceased Dahyabhai Chotttubhai is binamidar deceased Karsanbhai Chottubhai with regard to the lands in question.

(ii) In the facts and circumstances of the case, it would have been held that it is open for the parties to have alternative plea namely the ownership on title and also the question of ownership of Binami transaction.

6. Mr.R.N. Shah, learned counsel for the appellants

submitted that the suit filed by the plaintiffs, was barred by limitation, as it was filed after a lapse of 12 years from the date of the purchase of the property. It is also submitted that the suit filed in the year 1982 is barred by limitation, because the name of Karshanbhai came to be recorded in the column of occupant. His further submission is that if the plaintiffs fail in proving that they were disposed within a period of 12 years, then the suit cannot be maintained. His further submission is that present is a case of benami transaction, because, the person in whose name the property was purchased, was not residing in India and the property continued in possession of the family of the defendants. He also submitted that the defendants are entitled to raise alternative and mutually exclusive destructive pleadings at the same time to defeat the case of the plaintiffs. According to Mr.Shah, learned counsel for the appellants, if the plea of benami falls, then the defendants would be entitled to raise question of adverse possession.

7. Mr.Dalal, learned counsel for the respondents, on the other hand, submitted that present case would fall under Article 65 of the Indian Limitation Act and not under Article 64. According to him, the suit is not based on

previous possession, but the reliefs are claimed on the strength of the title. According to him, where Article 65 applies, a person is required to file suit within 12 years from the date when the possession of the person in possession becomes adverse to the rights of the true owner. According to him, after the death of Karshanbhai, when his sons started asserting their title, limitation started running and if the suit is filed in the year 1982, the suit cannot be thrown out on the ground of limitation. Regarding benami transaction, it is submitted by him that on one side, the defendants say that they were very poor and the property was given to them for their maintenance and at the same time, they say that after spending a sum of Rs.8000=00 (Rupees Eight Thousand only) somewhere in the year 1955, they had purchased the property. It is also submitted that exclusively alternative destructive pleadings can be raised but to succeed on the alternative pleadings, the parties must lead evidence and select one case out of two.

8. So far as the facts are concerned, in the opinion of this Court, Article 65 of the Indian Limitation Act, 1963 would apply. Present is not a case where the plaintiffs are seeking possession on the basis of their previous

possession and dispossession. The plaintiffs have come to the Court submitting inter-alia that they are owners of the property, the possession which was permissive, was sought to be converted into hostile title somewhere in the year 1979 or thereafter. When the defendants raised a plea that they had perfected their titles by prescription or by adverse possession and that the suit filed by the plaintiffs is barred by limitation, then, they are required to plead and assert that they had declared their intention openly and publicly, brought his intention to the notice of the plaintiffs and asserted their hostile title against the interest of the plaintiffs and their possession was known to everybody, it was in the notice of the public and despite all these, the plaintiffs did not take any step to restore the possession.

9. In the present case, upto the year 1973 i.e. upto the death of Dahyabhai, his brother Karshanbhai never declared that he was in adverse possession of the property. If Karshanbhai never declared his intention that he was in adverse possession of the property, then after his death, his sons would be required to declare or at lease assert that either they or their father were in adverse possession of the property. In the present case,

upto the year 1979, when Karshanbhai died, nobody asserted that the defendants were in adverse possession and had perfected title by remaining in adverse possession.

10. If a person remains in permissive possession, then also he is required to show to the court that on what particular date, he asserted his rights and declared that his permissive possession would be taken to be adverse, against the interest of the true owner. In the present case, neither Karshanbhai nor his children upto the year 1979 ever asserted that they were in adverse possession of the property, if after death of Karshanbhai the defendants started asserting their title, then the suit filed within three years cannot be said to be barred by limitation.

11. So far as the question of benami transaction is concerned, the question can straightway be decided against the interest of the defendants, because on one side, they are saying that they were too poor an the land was given to them for their maintenance and at the same time, they are playing trumpet that they had good money with them and they purchased the property in the name of elder brother. The two pleadings are mutually

destructive. However, as the question has been raised, I will consider the question of benami transaction. In a case where true owner comes to the court and says that the person who holds the title, in fact, has no interest in the property, then such true owner is required to show to the court that he had purchased the property, he had paid the consideration, the intention of the parties was to purchase the property in the name of someone else, but the title was to remain with other. That such true owner always exercised his authority as true owner over the property and the holder of the title, in fact, never asserted his title and remained a sleeping partner or a sleeping person. In the present case, since after 1955, Dahyabhai got his name mutated in the property, nobody raised any objection, sale deed is coming from the possession of Dahyabhai Family and nobody has proved that the consideration was paid by the defendants or the said Karshanbhai. If the requirements of the law are not satisfied, then it cannot be held that the defendants successfully proved their plea of benami transaction.

12. So far as the second question is concerned, on either of the question i.e. benami transaction or the adverse possession, I am unable to hold in favour of the

defendants, the defendants have failed in proving that they are true owners of the property and in relation to the alternative plea, they have again failed in proving that they were in adverse possession right from 1955. It is trite to say that the possession howsoever long would not become adverse unless the intention is declared by the person in possession.

13. The learned courts below were not unjustified in decreeing the suit and dismissing the appeal.

14. I find no reason to interfere. The appeal deserves to and is accordingly dismissed. There shall be no order as to costs. Interim relief, if any, is vacated. Let a decree be framed accordingly.

(R.S. GARG, J.)

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